Nos. 14-556, 14-562, 14-571 and 14-574

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Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL.,
PETITIONERS,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF
HEALTH, ET AL., RESPONDENTS.

VALERIA TANCO, ET AL., PETITIONERS,

v.

WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF
TENNESSEE, ET AL., RESPONDENTS.

APRIL DEBOER, ET AL., PETITIONERS,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL.,
RESPONDENTS.

GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL.,
PETITIONERS,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL.,
RESPONDENTS.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF *AMICI CURIAE* NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. AND NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF PETITIONERS

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Bostic v. Schaefer, 760 F.3d 352
(4th Cir. 2014)).....*passim*

Bourke v. Beshear, 996 F. Supp. 2d 542 (W.D. Ky.
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Brown v. Board of Education, 347 U.S. 483
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*City of Cleburne, Texas v. Cleburne Living
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Conaway v. Deane, 932 A.2d 571 (Md. 2007)..... 2

Craig v. Boren, 429 U.S. 190 (1976)..... 11

DeBoer v. Snyder, 772 F.3d 388 (6th Cir.
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Dred Scott v. Sanford, 60 U.S. 393 (1857) 15

Goodridge v. Department of Public Health,
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Frontiero v. Richardson, 411 U.S. 677 (1973)..... 11

Harper v. Virginia Board of Elections,
383 U.S. 663 (1966)..... 24

Heller v. Doe, 509 U.S. 312 (1993)..... 24

Hernandez v. Robles, 855 N.E.2d 1 (N.Y. 2006) 2

In re Marriage Cases, 183 P.3d 384 (Cal. 2008) 2

Jackson v. State, 72 So.2d 114, *cert. denied*,
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Kitchen v. Herbert, 755 F.3d 1193 (10th Cir. 2014) 2, 13, 26

Kitchen v. Herbert, 961 F. Supp. 2d 1181 (D. Utah 2013) 30

Latta v. Otter, 771 F.3d 456 (9th Cir. 2014) ... 2, 13, 24

Lawrence v. Texas, 539 U.S. 558 (2003) 6, 11, 23, 24

Lonas v. State, 50 Tenn. 287 (1871) 31

Loving v. Commonwealth, 147 S.E.2d 78 (Va. 1966) 7

Loving v. Virginia, 388 U.S. 1 (1967) ..... *passim*

Lucas v. Forty-Fourth General Assembly of State of Colorado, 377 U.S. 713 (1964) 27

McLaughlin v. Flordia, 379 U.S. 184 (1964) 1, 9

McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950) 1

Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938) 1

Morgan v. Virginia, 328 U.S. 373 (1946) 1-2

NAACP v. Alabama, 357 U.S. 449 (1958) 1

Naim v. Naim, 87 S.E.2d 749 (Va. 1955) ..... *passim*

Nixon v. Condon, 286 U.S. 73 (1932) 26

Oyama v. California, 332 U.S. 633 (1948) 11

Pace v. Alabama, 106 U.S. 583 (1883) 16

Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701 (2007) 25

Perez v. Sharp, 198 P.2d 17 (Cal. 1948) 23

Perry v. Schwarzenegger, 591 F.3d 1147 (9th Cir. 2010) 2

Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) 22

Plessy v. Ferguson, 163 U.S. 537 (1896) 29

Romer v. Evans, 517 U.S. 620 (1996) 2, 11, 27

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Scott v. State, 39 Ga. 321 (1869) 31

Shelley v. Kraemer, 334 U.S. 1 (1948) 30

Sipuel v. Board of Regents of the University of Oklahoma, 332 U.S. 631 (1948) 1

SmithKline Beechaum Corp. v. Abbot Labs, 740 F.3d 471 (9th Cir. 2014) 18

State v. Brown, 108 So. 2d 233 (La. 1959) 32

State v. Jackson, 80 Mo. 175 (1883) 31

Strauss v. Horton, 207 P.3d 48 (Cal. 2009) 2

Sweatt v. Painter, 339 U.S. 629 (1950) 1, 30

Town of Huntington v. Huntington Branch NAACP, 488 U.S. 15 (1988) 2

Turner v. Safley, 482 U.S. 78 (1987) 28

United States v. Carolene Products Co., 304 U.S. 144 (1938) 26

United States v. Virginia (VMI), 518 U.S. 515 (1996) 11

United States v. Windsor, 133 S. Ct. 2675 (2013) .....*passim*

Windsor v. United States, 699 F.3d 169, 182 (2d Cir. 2012), *aff'd on alternative grounds*, 133 S. Ct. 2675 (2013) 18-19

Zablocki v. Redhail, 434 U.S. 374 (1978)..... 12

Docketed Cases

Brenner v. Armstrong, appeal docketed, Nos. 14-14061, 14-14066 (11th Cir. Sept. 5, 2014) 2

De Leon v. Perry, appeal docketed, No. 14-20196 (5th Cir. Mar. 1, 2014)..... 2

Other Authorities

Jennifer Agiesta, *Poll: Obama's approval ratings stagnant despite economy*, CNN, Feb. 19, 2015, *available at* http://www.cnn.com/2015/02/19/politics/poll-obama-approval-rating-economy/.... 23

Brief and Appendix on Behalf of Appellee, *Loving v. Virginia*, 388 U.S. 1, Civ. No. 395, 1967 WL 113931 (Mar. 20, 1967).....*passim*

Bernard S. Cohen and Evan Wolfson, *Loving Equality*, Huffington Post, May 25, 2011, *available at* http://www.huffingtonpost.com/bernard-s-cohen-and-evan-wolfson/loving-equality_b_51866.html 13

Aderson Bellegarde François, *To Go into Battle with Space and Time: Emancipated Slave Marriage, Interracial Marriage, and Same-Sex Marriage*, 13 J. Gender Race & Just. 105 (2009)..... 14-15

Gallup, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958* (July 25, 2013), *available at* http://www.gallup.com/poll/169640/sex-marriage-support-reaches-new-high.aspx 9, 23, 24

Congressional Globe, 39th Congress, 1st Session 322 (1866) 29

John DeWitt Gregory & Joanna L. Grossman, *The Legacy of* Loving, 51 How. L.J. 15 (2007) 16

Brief of *Amicus Curiae* Idaho Governor C.L. "Butch" Otter, *DeBoer v. Snyder*, Nos. 14-556, 14-562, 14-571, 14-574 & 14-596 (U.S. Dec. 15, 2014) 17, 28, 29

Hon. A. Leon Higginbotham, Jr., *Shades of Freedom* (1996) 15

Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 Mich. L. Rev. 1447 (2004) 13, 16

Randall Kennedy, *Interracial Intimacies* (2003) 16

R.A. Lenhardt, *Beyond Analogy:* Perez v. Sharp, *Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 Calif. L. Rev. 839 (2008) ... 15, 23

Press Release, Congressman John Lewis, Rep. John Lewis Says DOMA Decision Is A Victory for Equality (June 27, 2013), *available at* https://johnlewis.house.gov/press-release/rep-john-lewis-says-doma-decision-victory-equality 13

Mildred Loving, *Loving for All*, Address at the 40th Anniversary of the *Loving v. Virginia* Announcement (June 12, 2007), *available at* http://www.freedomtomarry.org/page/-/files/pdfs/mildred_loving-statement.pdf 13

Douglas Martin, *Mildred Loving, Who Battled Ban on Mixed-Race Marriage, Dies at 68*, N.Y. Times, May 6, 2008, at B7 6

Phyl Newbeck, *Virginia Hasn't Always Been for Lovers: Interracial Marriage Bans and the Case of Richard and Mildred Loving* (2004) 16

Brief of the National Association for the Advancement of Colored People as *Amicus Curiae*, *Loving v. Virginia*, 388 U.S. 1, Civ. No. 395, 1967 WL 113930 (Feb. 28, 1967) 8, 16, 32

Brief of NAACP Legal Defense and Educational Fund, Inc. as *Amicus Curiae*, *Loving v. Virginia*, 388 U.S. 1, Civ. No. 395, 1967 WL 113930 (Feb. 28, 1967) 8, 18, 26, 33

Brief for Petitioners, *DeBoer v. Snyder*, No. 14-571 (U.S. Feb. 27, 2015) 25

Brief of *Amici Curiae* 76 Scholars of Marriage Supporting Review and Affirmance, *DeBoer v. Snyder*, Nos. 14-556, 14-562, 14-571, 14-574 & 14-596 (U.S. Dec. 15, 2015) 31, 34

Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 Harv. L. Rev. 1470 (2004) 11, 18

Transcript of Oral Argument, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395), *available at* http://www.oyez.org/cases/1960-1969/1966/1966_395. ..... 7, 8

Evan Wolfson, Loving v. Virginia – *and Mrs. Loving – Speak to Us Today*, 51 How. L. J. 187 (2007) 13, 14

INTEREST OF *AMICI CURIAE*[1]

The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit legal organization that, for more than seven decades, has fought to enforce the guarantees of the United States Constitution against discrimination. *See, e.g.*, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Sipuel v. Bd. of Regents of Univ. of Okla.*, 332 U.S. 631 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). Since its inception, LDF has worked to eradicate barriers to the full and equal enjoyment of social and political rights, including those arising in the context of partner or spousal relationships. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1 (1967); *McLaughlin v. Florida*, 379 U.S. 184 (1964).

Founded in 1909 and incorporated by the State of New York, the National Association for the Advancement of Colored People (NAACP) is the country's largest and oldest civil rights organization. The mission of the NAACP is to ensure the equality of political, social, and economic rights of all persons, and to eliminate racial hatred and racial discrimination. Throughout its history, the NAACP has used the legal process to champion equality and justice for all persons. *See generally NAACP v. Alabama*, 357 U.S. 449 (1958); *Morgan v. Virginia*,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

328 U.S. 373 (1946); and *Town of Huntington v. Huntington Branch NAACP*, 488 U.S. 15 (1988).

Both groups were actively involved in opposing bans on interracial marriage, and both filed *amicus curiae* briefs in *Loving v. Virginia*, 388 U.S. 1 (1967). Consistent with their opposition to all forms of discrimination, LDF and NAACP have written or joined as *amici curiae* in cases across the nation that affect the rights of gays and lesbians, including *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Bourke v. Beshear*, 996 F. Supp 2d 542 (W.D. Ky. 2014), *rev'd sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. Nov. 6, 2014), *cert. granted* 135 S. Ct. 1040 (Jan 16, 2015) (U.S. No. 14-571); *Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014); *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. 2014); *Latta v. Otter*, 771 F.3d 456 (9th Cir. 2014); *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010); *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Romer v. Evans*, 517 U.S. 620 (1996); *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006). *See also De Leon v. Perry, appeal docketed*, No. 14-50196 (5th Cir. Mar. 1, 2014) (ruling pending); *Brenner v. Armstrong, appeal docketed*, Nos. 14-14061, 14-14066 (11th Cir. Sept. 5, 2014) (held in abeyance). *Amici curiae* have a strong interest in the fair application of the Fourteenth Amendment to the United States Constitution, which provides critically important protections for all Americans, and submit that their experience and knowledge will assist the Court in this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In 1967, the Supreme Court faced the pivotal question of whether state bans on interracial marriage violated the Fourteenth Amendment. It was a deeply controversial issue in an era of significant racial strife. When Mildred Loving, an African-American woman, and Richard Loving, a white man, wed several years earlier, a staggering 96% of the country disapproved of interracial marriages. Up to that point, state courts had almost universally upheld bans on interracial marriage, and the Supreme Court itself had declined to squarely decide the issue just three years before. Yet, despite strong opposition, in *Loving v. Virginia* the Supreme Court unanimously held that banning interracial marriage violated the central tenets of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Today, this Court is presented with the opportunity to affirm the right to marry in a case with important parallels to *Loving*. It should hold that state bans on same-sex marriage violate the Fourteenth Amendment.

Loving is integral to the Court's analysis of same-sex marriage for two key reasons:

First, *Loving*'s principles and affirmative analysis strongly favor striking down bans on same-sex marriage. *Loving* held that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness" and that "all the State's citizens" possess a fundamental right to marry. 388 U.S. at 12. That reasoning applies with equal force here because neither *Loving* nor this Court's Fourteenth

Amendment jurisprudence is limited to racial discrimination. State prohibitions against same-sex marriage plainly discriminate on the basis of sexual orientation and sex and fall squarely within the protections of the Equal Protection Clause. *Loving*'s robust anti-subordination principle further makes clear that state laws that exclude certain groups from marriage effectuate a caste system that is contrary to the principles of Equal Protection. Because state bans of same-sex marriage relegate gay and lesbian couples to a lower social status with a badge of inferiority, they run afoul of the Equal Protection Clause.

Second, *Loving* soundly rejected many of the arguments that Respondents and their supporters have repurposed and advanced today. Namely, *Loving* rebuffed any claim that banning interracial marriage was justified by tradition or the Framers' original intent. The Court additionally rejected the contention that it was beyond the role of the judiciary to pass upon state laws that banned marriages. Furthermore, the Court lent no credence to research on the purported harm of interracial marriage to children and society. Such discriminatory arguments were, for generations, central to a system of oppression that grew out of slavery and were "designed to maintain White Supremacy." *Id.* Yet, today, nearly identical arguments decrying same-sex marriage as harmful to children, families, and heterosexual couples and norms, are mounted to justify state bans on same-sex marriage. *Loving*'s unanimous rejection of these sorts of theories is directly applicable to this case.

Loving is certainly important in doctrinal terms, but also because of how broadly and quickly the decision was accepted and celebrated. Four decades

ago, the "tradition" of banning interracial marriage seemed sacrosanct to the vast majority of Americans. Yet, such intolerance is now widely seen for what it truly was: racist, wrong, and unconstitutional. Whereas 96% of Americans once disapproved of interracial marriages, 87% of all Americans now support them. The sanction of interracial marriage has hardly destroyed the nation's citizenry, as the Virginia Supreme Court had crassly conjectured in the *Loving* case. Rather, *Loving* has fostered inclusion, helped bridge racial divides, and strengthened the social fabric of our increasingly diverse nation.

Loving's principles already reverberate through the sphere of same-sex marriage, in part because all persons yearn and deserve to be treated with equal dignity and respect, both individually and as married couples. Before 2004, gays and lesbians could not marry in any state in the United States. In recent years, however, many states and courts have gained "a new perspective" on same-sex marriage. *Windsor*, 133 S. Ct. at 2689. What was unfathomable just a decade ago is rapidly becoming familiar and accepted, as discriminatory state ban after discriminatory state ban is struck down across the country. Only 13 states currently prohibit same-sex marriage, which is fewer than the 16 states that banned interracial marriage when this Court decided *Loving*. Thus, discriminatory marriage laws, however they are couched, are neither etched in stone nor carved in the Constitution.

Loving teaches that positive change is readily possible – often more swiftly and thoroughly than expected. *Loving* has helped this country make considerable strides towards greater equality – even

as we still strive for further progress – and it should guide the Court's resolution of the case at bar.

ARGUMENT

Mildred Loving, an African-American woman, and her husband Richard Loving, a white man, were sleeping in their marital abode when three police officers, acting on an anonymous tip, burst into their Virginia home in the middle of the night, shone flashlights in their eyes, and hauled them off to jail. Mrs. Loving implored, "I'm his wife," pointing to her marriage certificate on the bedroom wall – but the sheriff retorted, "that's no good here."[2] After Mr. Loving spent one night in jail, and Mrs. Loving spent several more, the couple pled guilty to violating Virginia's "Racial Integrity Act," and were banished from the state for 25 years in return for a suspended one-year jail term. At sentencing, the trial judge proclaimed: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents . . . . The fact that he separated the races shows that he did not intend for the races to mix." 388 U.S. at 3.

The Lovings challenged the constitutionality of the state statute prohibiting their interracial marriage. The Virginia Supreme Court, however, upheld the law, relying primarily on an earlier decision, *Naim v. Naim*, which held that states had a right to "preserve . . . racial integrity" and prevent a "mongrel breed of citizens," "the obliteration of racial pride" and the

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[2] *See* Douglas Martin, *Mildred Loving, Who Battled Ban on Mixed-Race Marriage, Dies at 68*, N.Y. Times, May 6, 2008, at B7. The factual parallels to the persecution of gays and lesbians are also striking. *See, e.g., Lawrence v. Texas*, 539 U.S. 558 (2003) (police burst into a home, acting on an anonymous tip, and arrested two men for violating Texas' anti-sodomy statute).

"corruption of blood [that would] weaken or destroy its citizenship." 87 S.E.2d 749, 756 (Va. 1955), *cited in Loving v. Commonwealth*, 147 S.E.2d 78, 80 (Va. 1966).[3] The Virginia Supreme Court also reasoned that nothing in *Brown v. Board* "detracted in any way from . . . *Plessy* [*v. Ferguson*]," and that any contrary ruling would constitute "judicial legislation in the rawest sense." 147 S.E.2d at 80, 82.

Before this Court, Virginia defended its ban on interracial marriage on the basis of history and the original intent of the drafters of the Fourteenth Amendment. *See* Brief and Appendix on Behalf of Appellee, *Loving v. Virginia*, 388 U.S. 1, Civ. No. 395, 1967 WL 113931 at *14-30 (March 20, 1967) [hereinafter "*Loving* Virginia Br."]. Virginia warned that it was "not within the province of the court" to question the scientific basis, "wisdom, propriety, or desirability of preventing interracial alliances . . . ." *Id.* at *38. Virginia defended such bans on the grounds that "intermarriage constitutes a threat to society," leads to higher rates of divorce and separation, and is "wrong too because [it is] often based on the mistaken premise [of] . . . universalism and human brotherhood," which is "utterly fantastic . . . . if not absurd." *Id.* at *48 (citation and internal quotations omitted). A race "need [not] offer

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[3] *Naim* involved the conviction of a Chinese and white couple, notwithstanding Virginia's representation to this Court in *Loving* that "the intermarriage of whites and orientals . . . is not a problem with which Virginia has faced and one which is not required to adopt its policy forbidding interracial marriage too." Transcript of Oral Argument at 14, *Loving v. Virginia*, 388 U.S. 1 (1967) (No. 395).

apologies for their desire to perpetuate themselves," Virginia concluded. *Id.*[4]

LDF and the NAACP filed *amicus curiae* briefs, arguing that Virginia's ban was flatly unconstitutional. *See generally* Brief of NAACP Legal Defense and Educational Fund, Inc. as *Amicus Curiae*, *Loving v. Virginia*, 388 U.S. 1, Civ. No. 395, 1967 WL 113929 (Feb. 20, 1967); Brief of the National Association for the Advancement of Colored People as *Amicus Curiae*, *Loving v. Virginia*, 388 U.S. 1, Civ. No. 395, 1967 WL 113930 (Feb. 28, 1967) [hereinafter "*Loving* LDF Br." and "*Loving* NAACP Br.," respectively]. LDF urged the Court to apply heightened scrutiny and noted that "state legislative power over marriages is not omnipotent," since the "right to marry is a protected liberty under the Fourteenth Amendment and is one of the 'basic civil rights of man.'" *Loving* LDF Br. at *9 (citations omitted). LDF also lambasted Virginia's rationale for the law as an "amalgam of superstition, mythology, ignorance and pseudo-scientific nonsense summoned up to support the theories of white supremacy and racial 'purity.'" *Id.* at *9-11; *see Loving* NAACP Br. at *7-15 (debunking concepts of racial purity, interracial inferiority, and cultural implications). Likewise, the NAACP stressed that "there is no rational or scientific basis upon which a statutory prohibition against marriage based on race or color alone can be justified as furthering a valid legislative purpose," since the "right to marry is a civil right." *Loving* NAACP Br. at *5.

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[4] The book that Virginia relied upon as "definitive" also broadly condemned interfaith marriage, an argument Virginia made sure to preserve at oral argument. *See* Transcript of Oral Argument, *supra* n.3, at 21.

The Supreme Court unanimously struck down Virginia's ban, notwithstanding its reluctance to squarely decide the issue just a few years before. *Jackson v. State*, 72 So.2 114, *cert. denied*, 348 U.S. 888 (1954); *McLaughlin*, 379 U.S. at 195 (declining to "reach[] the question of the validity of the State's prohibition against interracial marriage"). *Loving* made clear that "[m]arriage is one of the 'basic civil rights of man,'" and that to "deny this fundamental freedom" on the basis of racial classifications violated the Fourteenth Amendment. 388 U.S. at 12. The Court also noted that a state's power to regulate marriage is "not unlimited." *Id.* at 7. *Loving* further set forth an anti-subordination principle holding that laws which exist solely to effectuate a caste system cannot stand. To that end, *Loving* reasoned that Virginia's ban had "no legitimate overriding purpose independent of invidious racial discrimination." *Id.* at 11.

In the years since *Loving*, none of the social or genetic harms crudely predicted by *Naim* have come to pass. Instead, public opinion on interracial marriage has shifted dramatically in favor of greater acceptance, and our nation has become significantly more inclusive. *See* Gallup, *In U.S., 87% Approve of Black-White Marriage, vs. 4% in 1958* (July 25, 2013) [hereinafter "Gallup Poll"] (finding that only 4% of Americans approved of interracial marriage in 1958 – and therefore 96% disapproved – whereas precisely 96% of adults age 18-29 approved in 2013). *See also City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 465 (1985) (Marshall, J., concurring) ("[W]hat was once a 'natural' and 'self-evident' ordering [of constitutional principles of equality] later comes to be seen as an artificial and invidious constraint on human potential and freedom.").

The history and holdings of *Loving* and its progeny are essential to this litigation. Thus, this brief first explores *Loving*'s overarching principles and their implications for state bans on same-sex marriage (Section I). It then explains how *Loving* rejected and debunked the repugnant theories that were espoused by Virginia in defense of its anti-miscegenation law, and demonstrates how the parallel arguments, which are now presented in defense of bans on same-sex marriages, must also be rejected (Section II). Together, these aspects of *Loving* make clear that the Fourteenth Amendment prohibits laws which deny consenting adults the right to marry based on their race, sexual orientation, or sex.

I. STATE PROHIBITIONS AGAINST MARRIAGE FOR SAME-SEX COUPLES VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Loving has special salience today, both because of its widespread acceptance and its direct application to same-sex marriage bans. Understanding the full import of *Loving* requires situating it in the broader context of this Court's Equal Protection jurisprudence.

A. The Fourteenth Amendment's Guarantee Of Equal Protection And The Holding In *Loving v. Virginia* Apply Beyond The Context Of Racial Discrimination.

Although the Fourteenth Amendment was ratified in the wake of the Civil War after a long struggle to eradicate slavery, its reach is not limited to racial discrimination alone. Over time, the Supreme Court made clear that, while the Fourteenth Amendment's

anti-discrimination principles were first articulated in cases involving racial discrimination, they are also applicable to governmental classifications that categorically exclude individuals from equal participation in our country's social and political community based solely on their status as members of certain groups.

The Court has held that the determination of whether the Fourteenth Amendment governs a particular governmental classification should involve consideration of such factors as whether the classification was predicated upon "social stereotypes," *Craig v. Boren*, 429 U.S. 190, 202 n.14 (1976), and/or whether it "create[s] or perpetuate[s] the legal, social, and economic inferiority" of a group that has been subjected to sustained discrimination, *United States v. Virginia* (*VMI*), 518 U.S. 515, 534 (1996). Relying on this analysis, the Court has held that the Fourteenth Amendment protects against governmental classifications that discriminate based not only on race, but also on such factors as national origin, sexual orientation, and sex. *See, e.g.*, *Lawrence*, 539 U.S. at 558 (sexual orientation); *VMI*, 518 U.S. 515 (1996) (sex); *Romer*, 517 U.S. at 620 (sexual orientation); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (sex); *Oyama v. California*, 332 U.S. 633 (1948) (national origin). This interpretation of the Fourteenth Amendment's Equal Protection Clause has been a critical component of our nation's ongoing effort to eliminate entrenched discrimination. *See* Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 Harv. L. Rev. 1470, 1547 (2004) ("[C]oncerns about group subordination are at the heart of the modern equal protection tradition . . . .").

Consistent with this history and purpose, the *Loving* decision's interpretation of the 14th Amendment transcended the factual confines of that case. In the course of declaring anti-miscegenation statutes unconstitutional, *Loving* explained that "[m]arriage is one of the basic civil rights of man" and that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness." 388 U.S. at 12 (citation and internal quotation marks omitted). *Loving*, therefore, supports the removal of discriminatory barriers to marriage in the "pursuit of happiness," not limited to racial discrimination. Nowhere did *Loving* limit or define marriage as exclusively between a man and a woman.

Courts have appreciated the broader significance of *Loving*. Justice Thurgood Marshall, LDF's founder, writing for the Court, declared that "[a]lthough *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for all individuals." *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978). In *Zablocki*, which involved the right to marry of so-called "deadbeat dads," the Supreme Court explained that *Loving* "could have rested solely on the ground that the statutes discriminated on the basis of race in violation of the Equal Protection Clause," but instead "went on to hold that the laws arbitrarily deprived the couple of a fundamental liberty protected by the Due Process Clause, the freedom to marry." *Id.* at 383.

More recently, the Fourth, Seventh, Ninth, and Tenth Circuits, which struck down same-sex marriage bans on various grounds, all recognized the importance of *Loving*. *Bostic*, 760 F.3d at 376 (citing *Loving* as the "most notabl[e]" demonstration that the

"right to marry is an expansive liberty interest that may stretch to accommodate changing societal norms"); *Baskin*, 766 F.3d at 666 (holding that the state's position "runs head on into *Loving* [], since the limitation of marriage to persons of the same race was traditional in a number of states when the Supreme Court invalidated it"); *Latta*, 771 F.3d at 476 (rejecting arguments about history and tradition because the "anti-miscegenation laws struck down in *Loving* were longstanding"); *Kitchen*, 755 F.3d at 1209 (citing *Loving* at length for the proposition that it framed "the right to marry at a broader level of generality than would be consistent" with the state's argument).

Legislators, practitioners, and scholars have reached the same conclusion. Civil rights icon, Congressman John Lewis, in condemning the Defense of Marriage Act on the floor of Congress, harkened back to Dr. Martin Luther King, Jr.'s declaration that "[r]aces do not fall in love and get married. Individuals fall in love and get married." *See* Press Release, John Lewis, Rep. John Lewis Says DOMA Decision Is A Victory for Equality (June 27, 2013) (quoting floor statement from 1996). The Lovings' attorney and even Mrs. Loving herself, in a rare public statement shortly before she passed away, recognized and supported *Loving*'s application to same-sex marriage. Bernard S. Cohen & Evan Wolfson, *Loving Equality*, Huffington Post, May 25, 2011; Mildred Loving, *Loving for All*, Address at the 40th Anniversary of the *Loving v. Virginia* Announcement (June 12, 2007). *See also* Pamela S. Karlan, *Foreword: Loving Lawrence*, 102 Mich. L. Rev. 1447 (2004); Evan Wolfson, Loving v. Virginia – *and Mrs. Loving – Speak to Us Today*, 51 How. L. J. 187 (2007).

The sole circuit to take an aberrant view of *Loving* was the Sixth, in the case presently before the Court. *DeBoer*, 772 F.3d at 411. Judge Sutton, writing for a 2-1 majority, cursorily discounted *Loving* on the grounds that "it did not create a new definition of marriage." *Id.* Judge Sutton, therefore, concluded that the laws of Kentucky, Michigan, Ohio, and Tennessee (hereinafter "States' Laws") could constitutionally ban same-sex marriage. Such an unduly narrow reading of *Loving* fails to meaningfully grapple with the case's overarching principles, namely the fundamental right to marry and the protection against subordination.

B. The History Of Anti-Miscegenation Laws Demonstrates How Exclusion From Marriage Perpetuates A Caste System In Violation Of Equal Protection Principles.

Loving recognized that anti-miscegenation laws were more than just arbitrary restrictions on the right to marry. They were also a vestige of slavery and a central component of a broader system that was "designed to maintain White Supremacy." 388 U.S. at 11. Because enslaved people and, later, interracial couples were denied the right to marry, that history is critical to an understanding of how the denial of the right to marry operates to perpetuate and enforce a caste system. It also makes clear that the full import of *Loving* is that the Equal Protection Clause cannot tolerate a structure that subordinates certain groups.

In the antebellum United States, virtually no state offered enslaved persons the right to marry. Aderson Bellegarde François, *To Go into Battle with Space and Time: Emancipated Slave Marriage, Interracial Marriage, and Same-Sex Marriage*, 13 J. Gender

Race & Just. 105, 142-43 (2009) ("[P]rior to Reconstruction no Southern state, with the arguable exception of Tennessee, granted full legal recognition to marriage between slaves." (footnote omitted)); *see also id.* at 110-12 ("The idea that the freedom to marry is a symbol of American freedom has roots in the institution of slavery."). With Emancipation came greater marital rights, but not across racial lines due to anti-miscegenation statutes.[5] As Chief Justice Taney explained in his infamous *Dred Scott v. Sandford* decision, anti-miscegenation statutes:

> show that a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, and governed as subjects with absolute and despotic power, and which they then looked upon as so far below them in the scale of created beings, that intermarriages between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes, not only in the parties, but in the person who joined them in marriage.

60 U.S. 393, 409 (1857); *see also* Hon. A. Leon Higginbotham, Jr., *Shades of Freedom* 44 (1996) ("Interracial marriages represented a potentially grave threat to the fledgling institution of slavery.").

Even after the adoption of the Fourteenth Amendment, anti-miscegenation statutes were still prevalent and upheld by the Supreme Court. In 1883, the Supreme Court held that anti-

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[5] The first statute in America expressly prohibiting interracial marriage was enacted in the seventeenth century. *See* R.A. Lenhardt, *Beyond Analogy:* Perez v. Sharp, *Antimiscegenation Law, and the Fight for Same-Sex Marriage*, 96 Calif. L. Rev. 839, 870 (2008).

miscegenation statutes were not discriminatory because they "appl[y] the same punishment to both offenders, the white and the black," *Pace v. Alabama*, 106 U.S. 583, 585 (1883). *See also Naim*, 87 S.E.2d at 756. This is perhaps unsurprising, given that "when the Fourteenth Amendment was drawn up and ratified, the vast majority of its supporters did not envision it as a bar to antimiscegenation laws." Randall Kennedy, *Interracial Intimacies* 277 (2003). Indeed, racial restrictions on marriage had a near universal and defining feature: "Every state whose black population reached or exceeded 5 percent of the total eventually drafted and enacted anti-miscegenation laws." *Id.* at 219 (citation omitted). At one point, approximately 40 of the 50 states prohibited African Americans from marrying whites. *Loving* NAACP Br. at *2.

Given the crucial role that anti-miscegenation laws played in maintaining our nation's racial caste system, *Loving* became "one of the major landmarks of the civil rights movement." Phyl Newbeck, *Virginia Hasn't Always Been for Lovers: Interracial Marriage Bans and the Case of Richard and Mildred Loving* xii (2004). *Loving* made clear that it was unconstitutional to subordinate certain groups by denying them the right to marry strictly on the basis of their race. *See* 388 U.S. at 12. "Legalizing interracial marriage was an essential step toward racial equality." John DeWitt Gregory & Joanna L. Grossman, *The Legacy of* Loving, 51 How. L.J. 15, 52 (2007). *See also* Karlan, *supra*, at 1147 ("*Loving* marked the crystallization, a dozen years after *Brown*, of the antisubordination principle . . . .").

Viewed in its full historical context, the holding in *Loving* has powerful implications for the constitutionality of bans on same-sex marriage. Like

the early laws designed to oppress African Americans, the States' Laws here consign lesbian and gay couples to an unequal and inferior status by denying them "a dignity and status of immense import": the status of state-sanctioned marriage. *Windsor*, 133 S. Ct. at 2692; *id.* at 2693 (noting that the federal Defense of Marriage Act was intended to express "moral disapproval of homosexuality"). This exclusion – which is premised on stereotypes and moral condemnation of gays and lesbians as a group – is both stigmatizing and demeaning, and perpetuates the historical discrimination long suffered by lesbians and gay people.[6] Moreover, this disapprobation creates and perpetuates a social hierarchy that disadvantages people based on their sexual orientation. Opponents of same-sex marriage often gild their arguments with the patina of tolerance, for example, by framing the issue in "definitional" terms, but stigma and scorn lie just beneath the surface. Sometimes the disparagement is implied, other times, it is manifest.[7] Regardless, the message of opponents is clear: gays and lesbians should not

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[6] While the African-American and gay and lesbian communities certainly have different histories, these distinctions do not undermine the reality that gays and lesbians also face discrimination and exclusion. *But see DeBoer*, 772 F.3d at 413-15 (reasoning that historical distinctions among these groups prevent an inference of prejudice against or a recognition of disenfranchisement of gay and lesbian couples).

[7] For example, Idaho claims that same-sex marriage erodes family-centric "norms" and "places the law's authoritative stamp of approval on such child-rearing arrangement." *See* Brief of *Amicus Curiae* Idaho Governor C.L. "Butch" Otter, at 9, *DeBoer v. Snyder*, Nos. 14-556, 14-562, 14-571, 14-574 & 14-596 (U.S. Dec. 15, 2014). The subtext is unmistakable: gay and lesbian couples are literally abnormal (*i.e.*, outside the norm) and not worthy of approval.

share in the rights of "traditional" marriage. However, as detailed herein, this argument directly contravenes *Loving*'s proscriptions that the Equal Protection Clause prohibits classifications that subordinate individuals based on certain characteristics, *see* Siegel, *supra*, at 1504 & n.125 (citing *Loving*, 388 U.S. at 7, 11) – here, sexual orientation.

C. State Prohibitions Against Same-Sex Marriage Should Fall No Matter What Level Of Constitutional Scrutiny Is Applied.

It is well-settled that courts should apply a more rigorous standard of review to government classifications that categorically exclude individuals from equal participation in our country's social and political community based solely on their status as members of a certain group. *See, e.g.*, *Loving*, 388 U.S. at 9; *Loving* LDF Br. at *6 (urging the application of "rigid scrutiny"). A faithful application of these principles reveals that more searching judicial review applies to laws that burden lesbians and gay men as a group. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 482 (9th Cir. 2014) (equal protection jurisprudence "refuses to tolerate the imposition of a second-class status on gays and lesbians").

We urge the Court to take this path – or at least leave it open. By virtually any measure, lesbians and gay men have been subjected to the kind of systemic discrimination that would trigger heightened Fourteenth Amendment protection. *See Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) ("It is easy to conclude that homosexuals have suffered a history of discrimination. . . . Ninety years of discrimination is entirely sufficient . . . ."), *aff'd on*

alternative grounds, 133 S. Ct. 2675 (2013). Indeed, the lone detractors of marriage equality concede that there is a shameful history of discrimination and antagonism against gays and lesbians. *See DeBoer*, 772 F.3d at 413.

But even under a more relaxed standard of review, the States' Laws could not pass constitutional muster. Several courts have recognized as much. *See e.g., Baskin*, 766 F.3d at 656 ("discrimination against same-sex couples is irrational"). Some states have struggled to offer a legitimate justification for same-sex marriage bans even under rational basis review and have experimented with different theories, *see infra* Section II.A-C. Many of these are so circuitous and "full of holes that [they] cannot be taken seriously." *Baskin*, 766 F.3d at 656.

Regardless of the level of scrutiny, the States' Laws should be invalidated. They plainly burden lesbians and gay men as a class, because they ban lesbian and gay couples from marrying and, thus, exclude them from "participating fully in our society, which is precisely the type of segregation that the Fourteenth Amendment cannot countenance." *Bostic*, 760 F.3d at 384. Accordingly, Equal Protection principles govern the constitutionality of laws denying the right to marry to lesbian and gay couples who "aspire to occupy the same status and dignity as that of a man and woman in lawful marriage." *See Windsor*, 133 S. Ct. at 2689.[8] Like any other law that demeans and

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[8] The fact that some of the States' Laws recognize marriages of lesbian and gay couples who were legally married in other jurisdictions does not alter the conclusion. The Lovings themselves were married in the District of Columbia before returning to Virginia, where they were convicted of violating Virginia's ban on marriage for interracial couples. *Loving*, 388 U.S. at 2-3. The Court in *Loving* struck down not only Virginia's

denigrates an entire class of people, the States' Laws here cannot be reconciled with the Fourteenth Amendment or *Loving*.

II. THE THEORIES ADVANCED IN SUPPORT OF THE BANS ON SAME-SEX MARRIAGE WERE ALSO PRESSED AND REJECTED REGARDING INTERRACIAL MARRIAGE BANS.

Respondents and their supporting *amici curiae* have presented myriad arguments against the straightforward recognition that banning same-sex marriage violates the Fourteenth Amendment. The primary theories include the following: (1) heterosexual marriage is rooted in tradition and supported by original intent; (2) the states should decide this issue, not the courts; (3) heterosexual-only marriage is needed to encourage "responsible procreation"; (4) marriage bans apply "equally" to (gay) men and (lesbian) women; and (5) same-sex marriage harms families, children, and society. All of these theories echo those advanced by proponents of anti-miscegenation statutes and rejected by the Supreme Court in *Loving*. The Sixth Circuit, and, increasingly, the states, have narrowed their focus to the first three theories, perhaps cognizant that the

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statute imposing criminal punishment on interracial couples who married, but also Virginia's "comprehensive statutory scheme aimed at prohibiting and punishing interracial marriages," a scheme that prohibited marriage for interracial couples within Virginia and denied recognition to marriages of interracial couples solemnized outside Virginia. *See id.* at 4, 12. *Loving* thus applies with equal force to state laws that prohibit recognition of lawful same-sex marriages celebrated outside the state as it does to laws that prohibit celebration of those marriages within the state.

logic of *Plessy* and the specter of gays and lesbians harming children are unpersuasive and offensive.

A. *Loving* Rejected The Notion That History And Tradition Justify Discrimination.

Respondents and their *amici curiae* rely heavily on history, tradition, and original intent to justify the bans on same-sex marriage. The Sixth Circuit stressed that heterosexual marriage is a "tradition measured in millennia," *DeBoer*, 772 F.3d at 396, and that an originalist interpretation of the Constitution, reinforced by tradition, confirms that marriage bans are permissible, *id.* at 404.[9]

This type of argument is nothing new. In 1955, the Virginia Supreme Court upheld a ban on interracial marriage on the grounds that the institution of marriage "may be maintained in accordance with established tradition," among other reasons. *Naim*, 87 S.E.2d at 756. In *Loving*, the trial court reasoned that marriage for interracial couples was aberrant and contrary to a proper understanding of the nature of marriage. 388 U.S. at 3 (reciting the trial court's invocation of racialized Creation theory). Before the Supreme Court, Virginia again appealed to tradition:

> The Virginia statutes here under attack reflects [sic] a policy which has obtained in this Commonwealth for over two centuries . . . . They have stood – compatibly with the Fourteenth Amendment, though expressly attacked

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[9] Other *amici curiae* argue that states have the right to define certain terms and institutions as they long have – but this is also a call to tradition by another name. The same could have been said about *Loving*: at one point, 40 states also had a "tradition" of defining marriage to exclude interracial couples.

> thereunder – since that Amendment was adopted.

Loving Virginia Br. at *52. Indeed, such arguments were broadly shared amongst proponents of anti-miscegenation laws. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 957 (N.D. Cal. 2010) (summarizing racial restrictions on marriage).

In *Loving*, however, the Court directly rejected claims that long-held beliefs about the incompatibility of interracial relationships and the traditional understanding of marriage (including those held by the Framers of the Fourteenth Amendment) should be controlling. *See* 388 U.S. at 9-10. Significantly, the Supreme Court declared anti-miscegenation statutes unconstitutional in spite of the fact that the majority of states ratifying the Fourteenth Amendment had such laws in place as recently as 1950. *Loving* Virginia Br. at *6; *Loving* 388 U.S. 9-10. The Court declared that these historical justifications for the prohibitions on interracial marriage were simply "not sufficient to resolve the problem" at hand. 388 U.S. at 9 (citing *Brown*, 347 U.S. at 489). Instead, the Court held that, regardless of the precise intentions of the Framers of the Fourteenth Amendment with respect to interracial marriage, anti-miscegenation statutes were inconsistent with the "broader, organic purpose" of the Amendment, which was "to remove all legal distinctions among 'all persons born or naturalized in the United States.'" 388 U.S. at 9 (quoting *Brown*, 347 U.S. at 489).

Thus, in *Loving*, this Court was wholly undeterred by the lack of tradition or precedent allowing interracial marriage, as, in 1967, only a single court –

the Supreme Court of California[10] – had found anti-miscegenation statutes to violate the Fourteenth Amendment. Nor was the Court persuaded by the widespread popular support for anti-miscegenation statutes throughout the vast majority of our nation's history, as demonstrated by the fact that nearly three in four Americans still opposed interracial marriage one year after *Loving* was decided. *See* Gallup Poll, *supra*. Despite this, "[n]either the *Perez* court nor the *Loving* Court was content to permit an unconstitutional situation to fester because the remedy might not reflect a broad social consensus." *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 958 n.16 (Mass. 2003).[11]

Even beyond the context of *Loving*, this Court has refused to credit the maintenance of tradition as a rational justification that satisfies the Fourteenth Amendment. *See Lawrence*, 539 U.S. at 579 ("As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom."); *see also Windsor*, 133 S. Ct. at 2689, 2689-93 (centuries-long "limitation of lawful marriage to heterosexual couples . . . came to be seen

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[10] California struck down its anti-miscegenation statute in *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948), at a time when a majority of states still had anti-miscegenation statutes in place, and all of the other courts confronting the question had ruled that there was no constitutional right to marry a person of another race. *See* Lenhardt, *supra* n.5, at 857.

[11] Though constitutional principles, not public opinion polls, govern these cases, today, 63% of Americans support marriage for same-sex couples, *see* Jennifer Agiesta, *Poll: Obama's approval ratings stagnant despite economy*, CNN, Feb. 19, 2015, a level of support that interracial marriage did not achieve until the late-1990s, *see* Gallup Poll, *supra*, almost thirty years *after Loving*.

[in some states] . . . as an unjust exclusion . . . . [and] reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality."); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 669 (1966) ("[T]he Equal Protection Clause is not shackled to the political theory of a particular era."); *Bostic*, 760 F.3d at 380 ("'[A]ncient lineage of a legal concept does not give it immunity from attack.'" (quoting *Heller v. Doe*, 509 U.S. 312, 326 (1993)).

Likewise, lower courts have rejected these traditionalist arguments in the context of same-sex marriage. *See, e.g.*, *Bostic*, 760 F.3d at 380 ("Preserving the historical and traditional status quo is therefore not a compelling interest that justifies the Virginia Marriage Laws."); *Latta*, 771 F.3d at 476 ("[N]either history nor tradition [can] save [the laws] from constitutional attack.") (quoting *Lawrence*, 539 U.S. at 577–78). This is because not every tradition has constitutional significance. As the Seventh Circuit explained in *Baskin*, there are "harmless" traditions, and "mindless" traditions and also discriminatory traditions. 766 F.3d at 667. "Tradition per se . . . cannot be a lawful ground for discrimination – regardless of the age of the tradition." *Id.* at 666.

Finally, the demise of the "tradition" of banning interracial marriage has been an incredibly positive step in terms of helping our society move toward greater racial equality. The legalization of such marriage, together with the other advances of the civil rights movement, has led to a remarkable reversal in public opinion. *See* Gallup Poll, *supra* ("87% of Americans now favor marriage between blacks and whites, up from 4% in 1958.").

There is no reason to fear embracing a new, more inclusive tradition or to devolve into some epistemological debate about the long-term impacts of changing established traditions.[12] *Loving* did not require definitive proof of what the long-term impact of interracial marriage might be, nor could it have. Same-sex marriage is now permissible in more states than interracial marriage at the time of *Loving*,[13] and the sky has not fallen. "[O]ur tradition is to go beyond present achievements, however significant, and to recognize and confront the flaws and injustices that remain." *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 787 (2007) (Kennedy, J., concurring in part and concurring in the judgment). That overarching tradition of progress and inclusion should rule the day.

B. *Loving* Rebuffed Arguments About The Role Of Judicial Review.

Respondents and their supporters contend that federal courts should not decide the propriety of banning same-sex marriage, but instead reserve that question for the states. The Sixth Circuit revisited this argument in various forms. *DeBoer*, 772 F.3d at 396 (this case comes down to "who decides" how to "handle change"), *id.* at 419 ("[W]ho are we [federal courts] to say?").

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[12] *But see DeBoer*, 772 F.3d at 406 ("Even today, the only thing anyone knows for sure about the long-term impact of redefining marriage is that they do not know.").

[13] *Compare* Brief for Petitioners at 22, *DeBoer v. Snyder*, No. 14-571 (U.S. Feb. 27, 2015) ("[S]ame-sex couples [are] now allowed to marry in thirty-seven states. . . "), *with Loving*, 388 U.S. at 6 (at the time of the oral argument and the subsequent decision, "Virginia [was] one of 16 States which prohibit and punish marriages on the basis of racial classifications.").

In *Loving*, Virginia made a very similar claim about why federal courts should not scrutinize the "wisdom" of interracial marriage bans or engage in "judicial legislation." *Loving* Virginia Br. at *13. Yet, as noted by LDF's *amicus curiae* brief in *Loving*, no one asked the courts to engage in such "legislation" – the Lovings challenged a specific statute as unconstitutional, and it was the state's burden to justify that law. *Loving* LDF Br. at *13. *See also Bostic*, 760 F.3d at 379-80 (rejecting the state's argument that federalism interests justified infringing upon the right to marry); *Kitchen*, 755 F.3d at 1228 (agreeing that striking down the state law at issue here would not subvert the federalist, democratic process).

Equal protection law locates *in the judiciary* a special responsibility of prodding society to reexamine assumptions that are rooted in animus, bigotry, and social stereotypes that, in turn, entrench social caste. *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (discussing laws that restrict political processes or target discrete and insular minorities). While all branches of government have a role to play in ensuring the equal protection of the laws, the judicial branch is best situated to safeguard historically subordinated groups, including lesbians and gay men, whom majoritarian political processes are often unwilling or unable to protect against constitutional violations. *Nixon v. Condon*, 286 U.S. 73, 89 (1932) ("[Equal protection] lays a duty upon the court to level by its judgment these barriers . . . .").

Nor does the fact that some bans on same-sex marriage were brought about by ballot initiative, as opposed to legislation, inoculate such laws from

constitutional review.[14] "[T]hat [a law] is adopted in a popular referendum is insufficient to sustain its constitutionality. . . . A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas v. Forty-Fourth Gen. Assembly of State of Colo.*, 377 U.S. 713, 736–37 (1964). *See also City of Cleburne*, 473 U.S. at 448 ("It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, and the City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic.") (citations omitted); *Romer*, 517 U.S. at 620 (invalidating a state constitutional amendment that excluded, gays, lesbians, and bisexuals from anti-discrimination protections).[15] The Court has not wavered in weighing in on these issues before, and it need not hesitate to fulfill its role now.

C. *Loving* Did Not Link The Right To Marry To The Ability To Procreate.

In upholding same-sex marriage bans under rational basis review, the Sixth Circuit also reasoned that people "need the government's encouragement to create and maintain stable relationships within which children may flourish." *DeBoer*, 772 F.3d at 405. This is a variant upon what has come to be

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[14] *But see DeBoer*, 772 F.3d at 421 (reasoning that it is better to "let the people resolve new social issues like this one," through "customary political processes").

[15] The Sixth Circuit's passing reference, 772 F.3d at 409, to dicta in *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1638 (2014), does not change matters, since this is a case about the merits of a constitutional issue, not the process by which a law was brought about.

known as the "responsible procreation" theory, although some other *amici curiae* frame the same concept more in terms of child-rearing norms and institutions. *See* Brief of *Amicus Curiae* Idaho Governor, *supra*, at 7-9.

This Court can readily dispose of this contention. Nowhere did *Loving* link the right to marry to a couple's ability to procreate. Although the Lovings happened to have biological children, this Court never suggested that its decision rested in any part on the Lovings' intention or ability to procreate. Other of this Court's decisions have made clear that the right to marriage is not dependent on the capacity for procreation but is, instead, an "expression[] of emotional support and public commitment." *Turner v. Safley*, 482 U.S. 78, 95 (1987) (holding that incarcerated persons have the right to marry); *Windsor*, 133 S. Ct. at 2689 (same-sex couples seek the right to marry to "affirm their commitment to one another before their children, their family, their friends, and their community . . . and so live with pride in themselves and their union").

In the lower courts, the "responsible procreation" theory has been regarded as "so full of holes that it cannot be taken seriously." *Baskin*, 766 F.3d at 656. Even the Sixth Circuit acknowledged that "the foolish, sometimes offensive, inconsistencies that have haunted marital legislation," include the fact that "States allow couples to continue procreating no matter how little stability, safety, and love they provide the children they already have." *DeBoer*, 772 F.3d at 406.

Moreover, there is simply no support for the proposition that removing discriminatory restrictions on the right to marry will, in any way, affect existing

marital or procreative practices. Indeed, "[r]ecognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage, any more than recognizing the right of an individual to marry a person of a different race devalues the marriage of a person who marries someone of her own race." *Goodridge*, 798 N.E.2d at 965.

D. *Loving* Rejected The Proposition That Interracial Marriage Bans Applied "Equally."

Some *amici curiae* continue to contend that banning marriage equality does not discriminate on the basis of sex because it applies "equally" to men and women. *See, e.g.*, Brief of *Amicus Curiae* Idaho Governor, *supra*, at 18 ("[T]here is already perfect formal equality between homosexuals and heterosexuals.") (citation and internal quotations omitted).

This line of reasoning is particularly audacious, given its unambiguous and repeated rejection in the context of segregation and interracial marriage. It is especially stunning to see this argument revived in light of its shameful origins from *Plessy v. Ferguson*, which held that segregation was not discriminatory because it applied "equally" to individuals of all races, 163 U.S. 537, 551 (1896). Likewise, in *Loving*, Virginia argued that its anti-miscegenation statutes were not discriminatory because a "law forbidding marriages between whites and blacks operates alike on both races." *Loving* Virginia Br. at *17 (quoting Cong. Globe, 39th Cong., 1st Sess. 322 (1866)).

Even assuming *arguendo* that these laws are ostensibly facially neutral, because they prohibit both men and women from marrying a person of the same

sex, this would not undermine a finding of an Equal Protection violation. *Loving* directly "reject[ed] the notion that mere 'equal application'" of a statute somehow evades the protections of the Fourteenth Amendment. 388 U.S. at 8. The Court recognized that, despite the symmetrical application to members of different races, Virginia's laws operated in a racially discriminatory manner because they "proscribe[d] generally accepted conduct if engaged in by members of different races." *Id.* at 11; *see also Romer*, 517 U.S. at 633 ("Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." (quoting *Sweatt v. Painter*, 339 U.S. 629, 635 (1950); *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948))).

As in *Loving*, this Court must reject the contention that there is no sex discrimination in the instant cases because the state law here treats men and women equally. *Loving* found that Virginia's anti-miscegenation laws classified – and discriminated against – persons on the basis of race because the legality of a marriage turned on the races of the adults seeking to exercise their right to marry (*i.e.*, only same-race marriages were permitted). *See Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013) (rejecting the state's argument that its prohibition against same-sex marriage applies "equally" to both men and women and analogizing *Loving*). The States' Laws here similarly classify – and discriminate against – persons on the basis of sex because the legality of a marriage turns on the sex of the adults seeking to exercise their right to marry (*i.e.*, only opposite-sex marriages are permitted). It also discriminates on the basis of sexual orientation. All of these circumstances violate the Equal Protection Clause.

E. *Loving* Refused To Credit Theories That Interracial Marriage Harmed Children Or Society.

The theory that same-sex marriage harms children or society, while previously in vogue, has largely been abandoned by the states, presumably because it was unsuccessful and incorrect. Nevertheless, various *amici curiae* still advance this theory in some form. *See generally* Brief of *Amici Curiae* 76 Scholars of Marriage Supporting Review and Affirmance, *DeBoer v. Snyder*, Nos. 14-556, 14-562, 14-571, 14-574 & 14-596 (U.S. Dec. 15, 2015).

In the context of race, these sorts of arguments were also once common. Historically, courts and opponents of interracial marriage argued that such unions harmed children. *See, e.g.*, *State v. Jackson*, 80 Mo. 175, 179 (1883) (interracial couples "cannot possibly have any progeny"); *Lonas v. State*, 50 Tenn. 287, 299 (1871) (interracial couples are "unfit"); *Scott v. State*, 39 Ga. 321, 323 (1869) (biracial children are "unnatural," "sickly," "effeminate," and "inferior").

Indeed, the belief that interracial couples would produce damaged children was a key rationale proffered by the Virginia Supreme Court in upholding an anti-miscegenation statute. *Naim*, 87 S.E.2d at 756 (endorsing "the power of the State to regulate the marriage relation so that it shall not have a mongrel breed of citizens"). Four years later, the Louisiana Supreme Court upheld another anti-miscegenation statute on the grounds that interracial marriages spawned "half-breed children" who "have difficulty in being accepted by society" and "are burdened, as has been said in another connection, with 'a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely

ever to be undone.'" *State v. Brown*, 108 So. 2d 233, 234 (La. 1959) (quoting *Brown*, 347 U.S. at 494).

In defending its anti-miscegenation statutes before the Supreme Court in *Loving*, Virginia cited purportedly scientific sources for its contention that prohibitions against marriage for interracial couples were in the interest of children. These theories took various forms, including: (1) assertions that interracial children might be genetically disadvantaged, *Loving* Virginia Br. at *43 ("[W]here two [widely distinct] races are in contact the inferior qualities are not bred out, but may be emphasized in the progeny . . . ." (internal quotation marks omitted)); (2) cultural arguments that only monoracial couples could provide a coherent cultural heritage necessary for a proper upbringing, *id.* at *44-45 ("[M]uch that is best in human existence is a matter of social inheritance, not of biological inheritance. Race crossings disturb social inheritance." (internal quotation marks and citations omitted)); and (3) sociological claims that interracial marriages were more likely to divorce, *id.* at *45, *47-48 (citation omitted).

As LDF stressed at the time, these arguments amounted to an "amalgam of superstition, mythology, ignorance and pseudo-scientific nonsense summoned up to support the theories of white supremacy and racial 'purity.'" *Loving* LDF Br. at *9-10. Likewise, the NAACP argued that these theories were "outmoded and unscientific" assumptions "abhorrent to both science and jurisprudence," and "disprove[n]" by "[c]ontemprary physical anthropology and human genetics. . . ." *Loving* NAACP Br. at *7.

This Court agreed, rejecting these theories as unfounded, post-hoc rationalizations for Virginia's discriminatory marriage laws. *Loving*, 388 U.S. at 11

("There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."). *Loving* refused to even credit *Naim*'s pseudo-scientific theories, casting them aside instead as "obviously an endorsement of the doctrine of White Supremacy." *Id.* at 7. With time, it has become even clearer how blatantly offensive and preposterous these theories really are.

Today's arguments about the purported harm to children, families, and heterosexuals are as offensive as they were in 1967. They are also patently wrong. The overwhelming consensus is that "there is no scientific evidence that parenting effectiveness is related to parental sexual orientation," and "the same factors" – including family stability, economic resources, and the quality of parent-child relationships – "are linked to children's positive development, whether they are raised by heterosexual, lesbian, or gay parents." *Bostic*, 760 F.3d at 383 (internal quotations omitted) (quoting *amicus* brief on behalf of the American Psychological Association, American Academy of Pediatrics, American Psychiatric Association, National Association of Social Workers, and Virginia Psychological Association). Indeed, even *amici curiae* in support of Respondents acknowledge that the primary study they cite found "'no evidence' that allowing same-sex marriage has any effect on U.S. heterosexual marriage rates," although they criticize the study's methodology and plead for more time. Brief of *Amici Curiae* 76 Scholars of Marriage, *supra*, at 13-14. Whatever the pseudoscientific theory *du jour* may be, this Court should not deign to reconsider these unsupported and irrational arguments in the present case.

CONCLUSION

The proud legacy of *Loving* is deeply relevant to this Court's assessment of the constitutionality of laws banning same-sex marriage. *Loving*'s principles transcend the factual confines of that case and support a finding in this case that consenting adults should not be denied the right to marry solely because of their sexual orientation or sex. Logically and legally, the arguments against interracial marriage and same-sex marriage bear striking similarities and fatal flaws. It is hard to imagine that their fate will not be the same. Today, *Loving* has been almost universally celebrated, and the repugnant theories hurled against interracial couples have been largely relegated to the dustbin of history. This progress is central to *Loving*'s promise: that forms of equality that were once inconceivable can become indisputable. There will likewise come a time when the rights of lesbian and gay couples to express their love and commitment through marriage will no longer be subject to debate. Our nation has a tremendous capacity to move forward. To ensure the equal protection of law, this Court should reverse the Sixth Circuit's decision below.

Respectfully submitted,

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